ORAL ARGUMENT SCHEDULED FOR NOVEMBER 14, 2018

CASE NOS. 18-1037, 18-1043

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PENNSYLVANIA INTERSCHOLASTIC ATHLETIC ASSOCIATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
Intervenor

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S FINAL OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner Pennsylvania Interscholastic Athletic Association, Inc. (PIAA) is a non-profit corporation whose primary purpose is to promote uniformity of standards in the inter-scholastic athletic competitions of its member schools. Petitioner has no parent company, public or otherwise, and no shareholders of any kind.

/s/Maurice Baskin
Maurice Baskin

PETITIONER'S CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici.

1. PIAA is the Petitioner.

2. The National Labor Relations Board ("Board" or "NLRB") is the Respondent and Cross-Applicant for Enforcement.

3. The Office and Professional Employees International Union ("OPEIU") was the Charging Party and Petitioner in the proceedings before the Board and has intervened in this appeal.

4. The following organizations filed briefs as *amici* in proceedings before the Board: National Federation of State High School Associations, and Association of Minor League Umpires, OPEIU Guild 322.

B. Rulings Under Review.

Petitioner seeks review of the Board's Decision and Order captioned as *Pennsylvania Interscholastic Athletic Association, Inc*. in Case No. 6-CA-175817, reported at 366 NLRB No. 10 (Jan. 26, 2018), which incorporates by reference the Decision and Order in Case No. 06-RC-152861, reported at 365 NLRB No. 107 (2017).

C. Related Cases.

The instant case has not previously been before this Court or any other court involving the same parties. However, the Board's decision expressly relies on a decision, *FedEx Home Delivery*, 361 NLRB No. 55 (2014), that was vacated by this Court in *FedEx Home Delivery v. NLRB,* 849 F.3d 1123 (D.C. Cir. 2017), *rehearing den*. (D.C. Cir. June 23, 2017).

/s/ Maurice Baskin
Maurice Baskin

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GLOSSARY

APA: Administrative Procedure Act

CX: Company (PIAA) Exhibit in RD hearing

GCX: General Counsel Exhibit in support of summary judgment

JA: Joint Deferred Appendix

DDE: Regional Director's Decision and Direction of Election

JX: Joint Exhibit in RD hearing

NLRA: National Labor Relations Act

NLRB or Board: National Labor Relations Board

NLRB Dec. on Review: NLRB Decision affirming the RD after review, 365 NLRB No. 107 (July 11, 2017)

NLRB SJD: NLRB Decision on summary judgment, 366 NLRB No. 10 (Jan. 26, 2018)

OPEIU or Union: Intervenor Office and Professional Employees International Union

PIAA: Pennsylvania Interscholastic Athletic Association, Inc.

PX: Petitioner (Union) Exhibit in RD hearing

RD: Regional Director

Tr: Transcript of RD hearing

I. JURISDICTION

This is a petition for review from decisions of the NLRB, and a cross-application for enforcement by the Board, as to which this Court has jurisdiction pursuant to Section 10 of the NLRA, 29 U.S.C. § 160. The Board's Orders are final with respect to all parties.

II. ISSUES PRESENTED

1. Whether the Board's Order must be denied enforcement because it expressly relies throughout on a decision, *FedEx Home Delivery*, 361 NLRB No. 55 (2014), that was vacated by this Court in *FedEx Home Delivery v. NLRB,* 849 F.3d 1123 (D.C. Cir. 2017), *rehearing den*. (D.C. Cir. June 23, 2017).

2. Whether the Board otherwise departed from controlling precedent under the NLRA and the common law of agency by finding that certain high school lacrosse officials in Pennsylvania are PIAA's employees, not independent contractors under Section 2(3) of the NLRA.

3. Whether the Board departed from precedent and otherwise erred in finding that PIAA is not a political subdivision within the meaning of Section 2(2) of the NLRA.

III. RELEVANT STATUTES AND REGULATIONS

Pertinent sections of the NLRA, as well as Pennsylvania Act 91, 24 P.S. § 1601, *et seq*., and the Pennsylvania Right to Know Law, 65 P.S. § 67.102, are set

forth in a Statutory Addendum attached to the end of this brief, in accordance with Circuit Rule 28(C)(5).

IV. STATEMENT OF THE CASE AND FACTS

A. Introduction

PIAA is a "state related entity" under Pennsylvania law, 65 P.S. § 67.102, operating as a non-profit corporation governed by state-imposed requirements to provide uniformity of standards in the interscholastic athletic competitions of its member schools in Pennsylvania. *See* 24 P.S. § 1601, *et seq*. PIAA maintains a list of registered sports officials who referee lacrosse games (and other sports) played by junior high and high schools. (*Id.*). PIAA has for decades treated the officials as independent contractors, consistent with longstanding Board precedent applying Section 2(3) of the Act to similarly situated collegiate basketball officials[1] and equally longstanding precedent of Pennsylvania state agencies declaring PIAA's officials to be independent contractors.[2]

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1 *See The Big East Conference*, 282 NLRB 335, *aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987).

2 *See PIAA, Pennsylvania Labor Relations Board (PLRB)* Case No. PERA-R-13, 417-C (1980) (dismissing union petition seeking to represent PIAA football officials due to officials' status as independent contractors); *see also Lynch v. WCAB*, 554 A.2d 159 (Pa. Cmwlth. 1989) (finding PIAA football official to be independent contractor); *Ray v. PIAA*, EUC-12-09-B-3131(Referee's Decision/Order May 24, 2012) (finding PIAA basketball official to be independent contractor).

Nevertheless, on May 22, 2015 the Union petitioned the NLRB to conduct an election among a group of Pennsylvania interscholastic lacrosse officials within PIAA's geographic Districts 7 and 8, naming PIAA as the "employer" of the officials. (Union Petition). PIAA contested the right of the Board to order an election among the officials on the ground that they are independent contractors within the meaning of Section 2(3) of the NLRA, not employees of PIAA. (JA640). In addition, PIAA asserted that the Board lacked jurisdiction over it, because PIAA is a political subdivision within the meaning of Section 2(2) of the Act. (*Id.*).

Following a hearing, the Regional Director of the Board's Region 6 issued a Decision and Direction of Election on July 30, 2015, finding that the officials were PIAA employees, not independent contractors under Section 2(3). (JA639). In making this decision, the Regional Director concluded that *Big East* had been superseded by the Board's more recent decision in *FedEx,* 361 NLRB No. 55 (2014), which purported to adopt a new legal standard for analyzing independent contractor cases. (*Id.*). In addition, the Regional Director held that PIAA is not a political subdivision under Section 2(2) of the Act but is instead a private employer within the jurisdiction of the Board under the NLRA. (*Id.*).

Disputing the Regional Director's findings on both issues, PIAA requested review from the Board on August 13, 2015, arguing that *Big East* should control,

not *FedEx*, and that in any event the common law of agency factors recognized as controlling in both cases compelled a finding that the officials were independent contractors, not employees within the meaning of Section 2(3) of the Act. (JA713). PIAA also contended that PIAA was a "political subdivision" of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the Act. (*Id.*). While PIAA's Request for Review was pending, an election was held in which a majority of officials in the petitioned-for unit voted for representation by the Union, and the Regional Director certified the results of that election on September 25, 2015. (JA744).

By order dated March 21, 2016, however, the Board granted PIAA's request to review the Regional Director's decision, though only as to the independent contractor issue. (JA745). Chairman Miscimarra in dissent would have also granted the request to review the Regional Director's ruling on the political subdivision issue. (*Id.*).

While the Board was reviewing the Regional Director's Decision, in March 2017, this Court issued its decision in *FedEx II* vacating the Board's *FedEx* decision on which the Regional Director had relied. 849 F.3d 1123 (D.C. Cir. 2017). The Court specifically held that the Board's purported new legal framework for independent contractor status was not entitled to judicial deference under the

Supreme Court's holding in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968). *See* 849 F.3d at 1127-28.

Nevertheless, on July 11, 2017, the Board issued its Decision on Review and Order upholding the Regional Director's 2015 decision and direction of election and affirming the certification of the election results. (JA791). As further discussed below, the Board relied heavily on its now-vacated *FedEx* decision, refusing to acquiesce to this Court's *vacatur*.[3] Summarizing the opinion to follow, the Board reiterated its reliance on *FedEx*: "Applying the *FedEx* analysis here, we find that the Employer has failed to establish that the officials are independent contractors rather than employees." (*Id*.).

In dissent, Board Chairman Miscimarra criticized the Board's reliance on *FedEx* and instead relied on the Restatement (Second) of Agency factors mandated by *United Insurance*, and the Board's own precedent in the *Big East* case, finding that "the lacrosse officials are independent contractors, not employees." (*Id*. at 13-20)[4].

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3 "We adhere to the independent-contractor analysis adopted by the Board in FedEx, supra, notwithstanding the District of Columbia Circuit's decision in that case." (JA791, n.3). A more detailed discussion of the Board's reliance on FedEx appears below.

4 Chairman Miscimarra observed inter alia the officials' exercise of independent discretion in officiating games, PIAA's lack of supervision of the games, the skills required of officials, their supply of their own tools, their short term tenure, their method of payment, the parties mutual understanding of independent status, and

PIAA thereafter refused to bargain with the Union, and on Jan. 26, 2018 the Board found on summary judgment that PIAA had violated the Act. (JA822).[5] PIAA filed its Petition for Review with this Court. (Petition for Review). The Board Cross-Applied for enforcement of its order, and the Union intervened in the appeal. (Cross-Application for Enforcement; Order Granting Motion to Intervene).

On March 23, 2018, PIAA moved this Court for summary reversal of the Board's order on the principal ground that the Board's decision relied on the *FedEx* standard that this Court had vacated in *FedEx II*, and could therefore not be enforced. The Court's motion panel denied PIAA's motion, holding that "the merits of the parties' positions are not so clear as to warrant summary action." (May 17, 2018 Order).

B. PIAA's Formation and Statutory Purpose

PIAA was formed in 1913 by a group of public high school principals as an entity that would establish and maintain consistency for interscholastic contests in the Commonwealth of Pennsylvania, by developing and administering

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the officials freedom to officiate at times and fees of their own choosing and in leagues outside PIAA. (*Id*. at 13-20).

5 It is well settled that an employer's only recourse to obtain judicial review of the Board's certification of a union representative is to refuse to bargain and then assert challenges to the certification in an unfair labor practice proceeding and subsequently in a court of appeals. See *NLRB v. Kentucky River*, 532 U.S. 706 (2001).

standardized rules and procedures for various sports, including lacrosse. (JA642).[6] At present, there are approximately 1400 member schools in PIAA, more than 85% of which are public schools. (JA26).

PIAA was effectively re-established in 2000 when the Pennsylvania General Assembly amended the Pennsylvania Public School Code to "deal with interscholastic athletics accountability." Act 91, 24 P.S. § 1601-A. The Act vested direct oversight over PIAA in the General Assembly, establishing the Pennsylvania Athletic Oversight Council. (24 P.S. §§ 1603-A, 1605-A; JA10-11). The Oversight Council by law included two state senators, two state representatives, the Secretary of Education, and a number of other public school officials appointed by the state Governor. 24 P.S. 16-603-A. The Oversight Council was succeeded by the Oversight Committee, created in 2004 and consisting of three state senators and three state representatives. 24 P.S. § 16-1605-A.

Act 91 also promulgated 13 individual state government standards with which PIAA was required to comply. These included subjecting PIAA to the Pennsylvania Sunshine Act requiring open meetings for public agencies; requiring PIAA to establish an open bidding policy for game site selection and for the

6 Though the Regional Director characterized PIAA's formation as "purely private" (JA642), there is no basis in the record for that assertion. Prior to 1972, the entire membership of the PIAA consisted of public schools. In that year, certain qualifying private schools were added to PIAA for the first time by order of the General Assembly in Act 219, 24 P.S. § 5-511(b)(1).

purchase of merchandise; requiring PIAA to establish a statewide evaluation system for sports officials at the post-regular season level; requiring PIAA to establish policies prohibiting conflicts of interest and rules of ethics; and requiring PIAA to undergo annual financial and management reviews by the General Assembly. (24 P.S. § 16-604-A; JA11, 643). The Act further declared that if PIAA failed to adhere to the standards set forth in the Public School Code, PIAA could be legislated out of existence, and would no longer be allowed to oversee the operation of interscholastic athletics in Pennsylvania. 24 P.S. §16-1603-A and 1604-A.

Act 91 also made substantial changes to the composition of PIAA's Board of Directors, rewriting and mandating representation of specified constituencies on the board, as a result of which a controlling majority of the thirty-one current board members are employed by or are associated with public education entities. 24 P.S. § 16-1604. (*See also* JA8-9). Though the Regional Director's DDE listed the constituencies for whom representation is mandated, she incorrectly asserted that only one member (the appointee of the State Education Department) represents the interests of public schools. (JA645). To the contrary, whereas only one representative of private schools is a designated member of the PIAA Board, no less than five board members are designated to represent public school boards, athletic directors and coaches, and another member represents a principals'

association that is predominately public. Meanwhile, under the PIAA Constitution, 18 of the remaining 25 board members, clearly a controlling interest, are representatives of district school members, 85% of which are public schools. (JA60, *see also* (JA415), identifying all of the Board members at the time of the RD hearing). PIAA Executive Director Lombardi testified without contradiction that the overwhelming majority of the Board members at the time of the hearing (who he identified by name) were employees of or affiliated with public schools in Pennsylvania. (JA26-27).

Also contrary to the findings of the Regional Director, pursuant to Act 91's provisions, the General Assembly exercises frequent and regular oversight over the PIAA, as evidenced by the report issued by the Legislative Budget and Finance Committee (JA466) and annual reports by the PA Athletic Oversight Committee (JA470-479). PIAA's Executive Director Dr. Robert Lombardi is required to testify annually before the Oversight Committee regarding PIAA's compliance with the state's governance standards. (JA11). PIAA submits its budget to the Oversight Committee upon request. (*Id.*). The General Assembly also reviewed PIAA's Constitution and Bylaws prior to passage of Act 91 and the Oversight Committee annually reviews these documents and every aspect of PIAA's operations. (*Id.*).

Of further relevance to this appeal, the General Assembly required PIAA to commission an independent study of whether PIAA officials were independent contractors or employees. That study, performed by the accounting firm Tallman Hudders, concluded that PIAA-registered sports officials were independent contractors for federal tax purposes, both during the regular season and the inter-district playoffs. (JA481-85).

In addition to Act 91, the General Assembly in 2008 expressly made PIAA subject to the state Right-to-Know law, defining PIAA as a "state-related entity," along with the Pennsylvania Turnpike Commission, the Pennsylvania System of Higher Education, the Pennsylvania Game Commission, and the Pennsylvania Public Utility Commission. 65 P.S. § 67.102. Indeed, a previous unsuccessful union organizing petition among PIAA football officials was filed with the Pennsylvania Labor Relations Board (PLRB). The PLRB accepted jurisdiction over PIAA as a state agency and dismissed the petition only upon finding that the officials were independent contractors. (JA486; JA10).

PIAA has been declared to be subject to Pennsylvania's Equal Rights Amendment (ERA), a constitutional amendment applicable only to Pennsylvania governmental entities. *See Commonwealth by Packel v. PIAA*, 334 Pa. Cmwlth. 839, 842 (1975); *Dillon v. Homeowners' Select*, 957 A.2d 772 (Pa. Super. 2008). The Pennsylvania Supreme Court has also declared PIAA's affairs constitute "state

action." *See School District of Harrisburg v. PIAA*, 453 Pa. 495, 503, 309 A.2d 353, 357 (1973). Significantly, both of these court rulings predated the passage of Act 91, showing that PIAA was already considered to be acting on behalf of the Commonwealth prior to the year 2000.

C. PIAA's Fulfillment of its Function of Promoting Uniform Standards For Interscholastic Competitions

As reflected in Act 91 and in PIAA's Constitution and Bylaws (JA54, 811), PIAA's primary purpose is to promote uniformity of standards in the interscholastic athletic competitions of its member schools throughout Pennsylvania. PIAA accomplishes this purpose by establishing procedures and rules governing schools, student-athletes, coaches, athletic directors, and officials. (JA54). The rules and procedures pertaining to officials appear primarily in Article XV of the Bylaws and in the Officials Manual. (JA87-9, JA417).

PIAA is organized into twelve geographical Districts, with District 8 comprising member schools in the City of Pittsburgh and District 7 comprising member schools in the eight county area surrounding Pittsburgh (*Id.*, Art. V). As noted above, the vast majority of schools in the two districts, as is true throughout the state, are public schools. (JA8). Within each of the twelve districts, PIAA-registered officials have formed "chapters" of officials whose stated purpose is to "join together to study the rules and go over interpretations," in order to maintain consistency in the application of contest rules. (JA651-52). One female

and one male official is also elected each year by the officials themselves to serve on the PIAA Board. (JA8).

During the seven weeks of the regular season lacrosse schedule, typically lasting from late March to mid-May, the district schools play lacrosse games against each other within their district, followed by a brief playoff period in the final month of the school year, starting with intra-district playoffs leading up to statewide inter-district championship playoffs (JA29).

In addition to its Constitution, PIAA maintains By-Laws, which are published in its Handbook and Officials' Manual. Section 4 of the By-Laws, the "Code of Ethics," requires officials to know the rules of the game they are officiating, honor all agreements to officiate contests, and "call them as one sees them" when officiating a game. (JA67). Significantly, the same section of the Bylaws establishes ethical requirements for schools, student- athletes, coaches, and athletic directors, none of whom are contended by any party to be employees of PIAA. (JA12, 486).

D. Relationship Between the Officials and PIAA

Article XV of the By-Laws describes the process of becoming a PIAA-registered official. (JA87-9). Applicants submit an Application for Registration form and a registration fee. They must pass a background check and receive a score of at least 75 percent on a PIAA-administered test. Once an applicant's

registration is approved by PIAA he or she is required to affiliate with a PIAA local chapter within 15 days. (JA31). Registered officials receive a lacrosse rule book published by the National Federation of High Schools (NFHS) and an ID card from PIAA. Prominently stated on the ID card is the statement that the identified official is an independent contractor. (JA496, JA32, 496). The officials join official chapters of PIAA and pay annual dues to PIAA. (JA31, 427-28).

Article XV, Section 4, of the PIAA By-Laws prescribes that all registered officials are independent contractors, not employees of PIAA. (JA87). PIAA member schools (not PIAA) enter into contracts with officials on the official contract form, entitled "Contract for Officials Under PIAA Rules," a copy of which is in the "Forms" section of the Handbook (JA8, 502). Because schools pick who will officiate games, and pay them an amount determined by the schools, the Contract is clearly between the official and the school (not PIAA). The Contract explicitly states: "Registered sports officials are independent contractors and therefore, are NOT employees of PIAA, the school, or the assignor." (emphasis in original). (*Id.*). It is undisputed in the record that the officials, including the Union witnesses, were well aware of this contractual statement that they voluntarily entered into, and knew that they were considered to be independent contractors. (JA31, 32, 34, 36, 43, 45, 50, 53).

It is thus the various school principals, not PIAA, who are responsible for engaging and contracting with sports officials for games in which their school is the home team. A principal may either find an official on his/her own or may use an "assignor" who has been retained by a group of schools who have organized themselves into a sports conference or league (JA29, 96, 132).

Each official is responsible for acquiring his or her own uniforms and equipment, including penalty markers, whistle, timing device, card, pencil, and hat. (JA29). Officials are given a copy of the lacrosse rule book published by the National Federation of High Schools (NFHS) (JA30, 417). Officials are entitled to refuse any assignment, can seek out particular assignments, can decide that they do not wish to work with certain other officials, and are provided with no guarantee of receiving any minimum number of game assignments. (JA29).

PIAA's code of ethics states that officials are exercise complete independence of judgment while they are calling a game. (JA30, 490-91). No PIAA supervision is present at officiated games, which are completely under the charge of the registered officials. (JA30).[7]

Article XV of the By-Laws also describes the process whereby sports officials can be removed from the PIAA registration list, primarily if an official is

7 The Regional Director incorrectly stated that PIAA Assistant Director Gebhart "is responsible for day-to-day oversight" of the officials. (JA663, n. 27). This finding was contrary to the evidence that there are 14,000 officials, who could not possibly be overseen on a day-to-day basis by a single individual. (JA640).

convicted or pleads guilty to certain serious crimes in the case of mandatory removal (which is dictated by state law, not PIAA), or in the case of discretionary removal, where PIAA's Board of Directors determines the official to be biased, incompetent, or unfair in game decisions. The record contains no evidence of any official being removed in this manner.

The PIAA Handbook contains certain Policies and Procedures applicable to schools, athletes, coaches, officials, and other groups affected by interscholastic athletics. (JA54). With relevance to officials, it is again noted therein that it is the schools who enter into the contracts with officials (JA153). Member schools or organized groups of schools who choose to utilize an "Assignor" to procure officials at specific games are encouraged but not required to use a form agreement, which can be found in the Forms section of the Handbook. (JA502). That form agreement again specifies it is the schools which are solely responsible for contracting with the officials to officiate regular season games, and that the Assignor who accepts the agreement is an independent contractor and not an employee of the Conference, League, or member schools. Even though selection may be made by an assignor, the form agreement confirms that game fees for officials will be determined and paid by the member schools. (*Id.*).

The amount of fees paid to officials during the regular season is negotiated between athletic directors representing the schools and the officials themselves.

The assignors are also paid by the schools, not PIAA. (JA29). During the brief playoffs, PIAA pays a pre-set fee of $80 per game to assigned officials. (JA 32). Neither the member schools nor PIAA itself withholds any money for taxes or social security from the officials' checks. (JA29). PIAA provides registered officials with liability insurance, supplemental medical insurance, and accidental death and dismemberment insurance, but it does not provide regular medical insurance, workers compensation insurance, or unemployment insurance. (JA29, JA31).

As noted above, PIAA does not provide any supervision or direction of the officials during a game. Judgment calls made by the officials during the game are not reviewed by anyone at PIAA (JA30). During the regular season PIAA does not perform performance evaluations. Officials are not required to submit any post-game reports to PIAA except where the official has disqualified/ejected a coach or player. (JA25). Officials have the discretion to issue such disqualifications in the exercise of their judgment, with PIAA receiving information about it only after the fact. (*Id.*).

During the playoffs PIAA does perform evaluations, only because such evaluations are mandated by PA Act 91. 24 P.S. § 16-1604-A. No official has ever been suspended or terminated, however, as a result of a negative evaluation. (JA33).

PIAA-registered officials are allowed to officiate at non-PIAA events, and frequently officiate contests involving non-PIAA member schools, out-of-state schools, and collegiate contests. (JA30). Many of the lacrosse officials in the certified bargaining unit have other jobs and careers, including union witness Mario Seneca who is a licensed attorney and a paid employee of the Union. (JA31). Another Union witness, an official named Edmund Guminski, worked full time as an NLRB field examiner. (JA47-8). Both during the regular season and the playoffs, officials have the entrepreneurial opportunity to control their own income by making themselves more available or less available to officiate games and by engaging in other career activities. (JA34).

V. SUMMARY OF ARGUMENT

The Board's Order must be denied enforcement because it expressly relied throughout the opinion on a decision, *FedEx Home Delivery*, 361 NLRB 610 (2014), that was in direct conflict with this Court's holding in *FedEx Home Delivery v. NLRB,* 563 F.3d 492 (D.C. Cir. 2009) *(FedEx I)*, and was in turn vacated by this Court in *FedEx Home Delivery v. NLRB (FedEx II),* 849 F.3d 1123 (D.C. Cir. 2017), *rehearing den*. (D.C. Cir. June 23, 2017).

Even if the Board decision in this case was somehow entitled to rely on *FedEx* in defiance of this Court's orders, the Board's finding that PIAA-registered lacrosse officials were employees, not independent contractors, must be reversed.

The Board departed from its own controlling precedent, *Big East Conference*, 282 NLRB 335, *aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143, (3d Cir. 1987), as well as more recent cases decided by the Board and this Circuit. Contrary to the Board's opinion, the common law agency factors strongly support a finding of independent contractor status, including the officials' complete exercise of independent judgment in officiating games, PIAA's lack of supervision of the games, the skills required of officials, their supply of their own tools, the short duration of their performance of work, their method of payment, the parties' mutual understanding of independent status, and the officials' entrepreneurial freedom to officiate at times and fees of their own choosing and in leagues and careers outside PIAA.

Finally, the Board erred in failing to find that PIAA is a political subdivision within the meaning of Section 2(2) of the NLRA, under both of the tests for such a finding set forth in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). Such a finding is compelled by the provisions of Act 91, 24 P.S. 16-1601, *et seq.*, which re-established and mandated that PIAA perform the public function of overseeing the state's system of interscholastic athletics. Act 91 and PIAA's Constitution further require the appointment of a PIAA Board majority overwhelmingly consisting of individuals who are appointed by public officials and/or who are public officials themselves, and are otherwise responsible.

VI. STANDING

PIAA has standing to seek review in this Court as an aggrieved party to a final order of the Board under 29 U.S.C. § 160(f). *See Retail Clerks Local 1059 v. NLRB*, 348 F. 2d 369, 370 (D.C. Cir. 1965).

VII. ARGUMENT

A. Standard of Review

It is well settled in this Circuit that the Board's failure to acquiesce to this Court's precedent will result in denial of enforcement of the Board's orders. *See Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed. Appx. 11 (D.C. Cir. 2016) ("The Board's refusal to adhere to our precedent dooms its decision before this court."); *see also Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2002) ("Time and again this Court has been required to overturn NLRB orders that violate the explicit requirements of our precedent."); *Lee Lumber v. NLRB*, 117 F.3d 1454, 1462 ("Case law in our circuit is as clear as it could be on this question. The Board, however, continues to ignore us. We continue to reverse.").

It is equally well settled that an agency's order can only be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Erie Brush v. NLRB, 700 F.3d 17 (DC Cir. 2012), citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962); and *SEC v. Chenery*, 332 U.S. 194, 196 (1947). As the Supreme Court further held in *Burlington*: "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing

with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . .” *Ibid*; *See also Kreis v. Sec'y of Air Force,* 406 F.3d 684, 686 (DC Cir. 2005) (“The court need only determine whether the [agency's] decision making process was deficient, not whether [its] decision was correct.”).

With regard to independent contractor issues, the Supreme Court has held that the Board is bound to apply the common law of agency as expressed in the Restatement 2d of Agency, Section 220(2) (1958). *NLRB v. United Insurance Co*., 390 U.S. 254, 256 (1968). The Supreme Court further held in *United Insurance* that NLRB determinations on the application of the common law “involve no special administrative expertise that a court does not possess,” and that a court “need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment.” *Id*. at 260.

Finally with regard to contentions of political subdivision status, the Court is bound to apply the test that the Supreme Court upheld in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971): A political subdivision is an entity that is either 1) created by the state, such that it constitutes a department

or administrative arm of state government, or 2) administered by individuals who are responsible to public officials or to the general electorate. *Id*. at 604-605.

B. The Board Decision on the Independent Contractor Issue Cannot Be Enforced on the Basis Articulated By the Agency Itself, Because the Board Relied Heavily on a Standard This Court Rejected in *FedEx II*

In the present case, the Board's finding of employee status indisputably rests on application of the Board's *FedEx* standard for resolving claims of independent contractor status; a standard that this Court rejected in *FedEx II*.[8] Because the Court cannot enforce the Board's order on the basis articulated by the Board, the Board's decision must be denied enforcement.

In *FedEx II*, the Court squarely rejected the Board's revised legal standard for evaluating independent contractor status, holding that the Board "cannot effectively nullify this court's decision in *FedEx I* by asking a second panel of this court to apply the same law to the same material facts but give a different answer." 849 F.3d at 1127. The Court further held that the Board's purported new legal framework for independent contractor status was not entitled to judicial deference, as follows:

> [T]he Supreme Court held in *United Insurance* that the question whether a worker is an "employee" or "independent contractor" under

8 At the outset of its opinion, the Board declared: "We adhere to the independent-contractor analysis adopted by the Board in FedEx, supra, notwithstanding the District of Columbia Circuit's decision in that case." In addition, the Board failed to acknowledge that this Court vacated the Board's FedEx decision. (JA811, n.3).

> the NLRA is a question of "pure" common-law agency principles "involv[ing] no special administrative expertise that a court does not possess." 390 U.S. at 260. Accordingly, this particular question under the Act is not one to which we grant the Board *Chevron* deference . . . .

Id. at 1128. Consistent with the foregoing, the Court refused to defer to the Board's new formulation of the legal test for independent contractor status, stating: "We do not accord the Board such breathing room when it comes to new formulations of the legal test to be applied." *Id*. at 1128.

Of particular significance here, the Court not only granted FedEx's petition for review and denied the Board's cross-application for enforcement in that case, but the Court also *vacated* the Board's order in its entirety. *Id*. The Court reaffirmed as much in its *Per Curiam* Order of Judgment:

> ORDERED and ADJUDGED that the petitions for review be granted, *the Board's orders be vacated*, and the cross-application for enforcement be denied, in accordance with the opinion of the court filed herein this date.

Case No. 14-1196, Document #1664085 (D.C. Cir. Mar. 3, 2017) (emphasis added). The Board petitioned for rehearing from this Order, but the full Court denied the petition on June 23, 2017.

An order to "vacate" means "to render inoperative; deprive of validity; void; annul." *NLRB v. Goodless Bros. Elec. Co., Inc.*, 285 F.3d 102, 110 (1st Cir. 2002) (citing Random House Webster's Unabridged Dictionary 1647 (2d ed. 1997). *See also Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797

(D.C. Cir. 1983) (Admonishing another agency that ignored the Court's order to vacate a rule: "To 'vacate' . . . means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'") (citations omitted). This Court should act now to enforce its *vacatur* order in *FedEx II* by denying enforcement of the Board's order here, which is *ultra vires*.

Even in the absence of *vacatur*, this Court has found that the Board acts in bad faith when it refuses to acquiesce to the Court's rulings without first seeking certiorari at the Supreme Court. *See Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016) (awarding attorneys' fees against the Board for bad faith litigation due to the Board's refusal to acquiesce to the Court's precedent contrary to the Board's analysis). As stated above in the Standard of Review, where the Board refuses to acquiesce to the decisional standards of this Circuit, the Court is required to deny enforcement. *Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed. Appx. 11; *Douglas Foods Corp. v. NLRB*, 251 F.3d at 1067; *Lee Lumber v. NLRB*, 117 F.3d at 1462. For these reasons as well, the Court should deny enforcement of the Board's order here.

In opposition to PIAA's motion for summary disposition, the NLRB and the Union incorrectly argued that PIAA somehow waived its *ultra vires* argument by failing to object to the Board's reliance on *FedEx* during the agency proceedings,

citing Section 10(e) of the Act. To the contrary, PIAA objected to the Board's application of *FedEx* to PIAA's officials at each stage of the Board proceedings. As fully explained in PIAA's reply to the oppositions, incorporated here by reference, PIAA's objections below were more than sufficient to preserve this issue for appeal to this Court. *See HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016) (criticizing "hyper-refinement" of party obligations under Section 10(e)); *see also Trump Plaza Associates v. NLRB,* 679 F.3d 822, 830 (D.C. Cir. 2012) (finding that Section 10(e) is satisfied when the Board was "sufficiently apprised" of the issue raised by the employer on appeal, such that requiring reconsideration would be an "empty formality").

PIAA properly objected below to the Board's certification of the Union as bargaining agent of the officials on the basis of their independent contractor status. PIAA specifically objected to the Board that the Board should adhere to its precedent in *The Big East Conference*, 282 NLRB 335, *aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987), and that the Board should not apply its newly announced standard in *FedEx Home Delivery*, 361 NLRB 610 (2014), to reach a different result. *See* (JA717, 724, 728, 729, 734,

735; JA750, 773-74, 778).[9] PIAA thereby satisfied the requirements of Section 10(e) of the Act prior to petitioning for review in this Court.[10]

C. Proper Application of the Common Law Agency Criteria Compels a Finding of Independent Contractor Status In This Case

The correct standard for determining independent contractor status under Section 2(3) of the NLRA was spelled out by the Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968), based on the common law of agency as explained in the Restatement (Second) of Agency 220(2) (1958). The common law standard, reaffirmed by this Court in *FedEx II*, considers the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind

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9 As a representative example of PIAA's objections to the Board, the Court is referred to PIAA's Request for Review, at p.1 (JA713), which reads as follows: "[T]he Regional Director erroneously concluded that PIAA-registered lacrosse officials are employees and not independent contractors. In so doing, she effectively ignored the only actual NLRB case precedent regarding the independent contractor status of sports officials, established by the Board [citing Big East]. Instead the Regional Director premised her Decision on owner-operator cases from the trucking industry where the analysis and issues are substantially different" [citing FedEx]. *See also* JA735, n.13: "The Regional Director's almost total reliance for her conclusion on *Fed Ex Home Delivery*, 361 NLRB No. 55 (2014) is misplaced."

10 It is also well settled in this Court that ultra vires actions of the Board, i.e., actions that exceed the Board's authority, constitute "extraordinary circumstances" under Section 10(e) that excuse any alleged failure to preserve an objection to a Board order in the court of appeals. *See HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016); *see also Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2550 (2014).

> of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.[11]

As noted above, the Supreme Court further held in *United Insurance* that NLRB determinations of the sort at issue here "involve no special administrative expertise that a court does not possess," and that a court "need not accord the Board's decision that special credence which we normally show merely because it represents the agency's considered judgment." *Id*. at 260.

With these considerations in mind, PIAA submits that the facts of this case strongly support a finding of independent contractor status under the law of this Circuit and also under the Board's own precedent from which the agency departed without adequate explanation or justification, as follows:

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11 The standard adopted by the Board in FedEx, rejected by this Court in FedEx II, improperly added an additional factor to the common law agency test: "whether the worker is rendering services as part of an independent business." *FedEx, supra*, slip op., p.1.

1. The Board Greatly Exaggerated the "Extent of Control" Factor In Making Its Erroneous Finding of Employee Status

The Board erroneously found that the "control" factor supported a finding of employee status, improperly basing this conclusion almost entirely on the fact that PIAA seeks to maintain standardized rules of lacrosse. (JA793-94). As Chairman Miscimarra pointed out in dissent, "when two teams play a game of lacrosse, everybody expects the officials to apply the rules of the game…which is hardly indicative of employee versus independent contractor status." JA804).

By far the closest precedent on this issue, and with regard to most of the other common law factors, is *Big East Conference*, 282 NLRB at 335. There, the Board found college basketball officials to be independent contractors rather than employees of the Eastern College Basketball Association (ECBA), despite standard setting activities by the ECBA that were strikingly similar to the actions of PIAA. Such activities were found not to support a finding of employee status, even though ECBA supervisors attended games and gave directions to the officials that were more substantial than any control exercised by PIAA over the officials here.

In the present case, PIAA exercises virtually no day-to-day control over the work performed by registered officials. It is undisputed that the officials call each game with no supervisor present; and they exercise completely independent judgment and discretion while officiating. Such independence has strongly

supported findings of independent contractor status by the Board itself in recent cases such as *Porter Drywall, Inc*., 362 NLRB No. 6, slip op. at 3 (2015) (discretion in how to complete work supported independent contractor finding); and *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 847 (2004). Unlike one of this Court's cases relied on by the Board majority here, *Lancaster Symphony Orchestra v. NLRB,* 822 F.3d 563 (D.C. Cir. 2016), there is no "conductor" on the lacrosse field.[12]

In attempting to compensate for the absence of any PIAA supervision of the officials here, the Board claimed that PIAA exercises "far-reaching control over the means and manner of the officials' work through its comprehensive rules." (JA793). But the Board ignored PIAA's exercise of similar controls over its member schools, the student athletes, principals, coaches, and athletic directors, all in the interests of ensuring fairness in athletic competitions. Of equal importance, the Board ignored PIAA's subservience both to the Commonwealth of Pennsylvania and the NFHS in mandating uniform standards. Thus, contrary to the Board, Act 91 of the Pennsylvania legislature *required* PIAA to enforce

12 The absolute day-to-day control exercised by the Lancaster conductor over symphony musicians was critical to the finding of employee status in that case. As this Court observed: "[T]he Lancaster Orchestra's conductor exercises virtually dictatorial authority over the manner in which the musicians play." 822 F.3d at 566, adding several examples from published texts on music theory. By contrast in the present case, there is no PIAA "conductor" on the field during lacrosse games, and the officials themselves are in complete charge.

standardized lacrosse officiating rules. 24 P.S. § 16-1604-A. Further, the rules PIAA enforces are not self-made but have instead been handed down, with limited exceptions, by the NFHS, the national athletic rule setting organization. This is another fact that parallels the *Big East* case, where the ECBA relied on the NCAA to draft the playing rules. *See Collegiate Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d at 147.

Under analogous circumstances, this Court has repeatedly held that "constraints imposed by customer demands and government regulations do not determine the employment relationship." *FedEx Home Delivery v. NLRB* ("*FedEx I*"), 563 F.3d 492, 501 (D.C. Cir. 2009), citing *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 859 (D.C. Cir. 1995); *North American Van Lines v. NLRB* ("*NAVL*"), 869 F.2d 596, 599 (D.C. Cir. 1989). Just so here, PIAA's reasonable efforts to maintain uniform standards in athletic contests - enforcing rules handed down by a national standard setting organization in compliance with a government mandate to ensure interscholastic fairness – cannot reasonably be relied on by the Board to craft a finding that officials are employees. Dissenting Chairman Miscimarra had it exactly right when he wrote:

> [I]t defies reason and logic to find that the lacrosse officials here are employees rather than independent contractors because they are expected by everyone – not merely the PIAA – to act like officials, to be recognizable as officials (by wearing the uniform of an official),and to adhere to the established rules governing high school lacrosse.

(JA804).

Finally, the Board majority applied a double standard in finding PIAA exercises "far reaching" control over officials by virtue of its *potential* authority to discipline or remove them, even though there is no actual evidence that any such authority has been exercised by PIAA. In the *FedEx* case on which the Board relies, the Board considered only *actual*, as opposed to potential, entrepreneurial opportunity as probative of independent contractor status. 361 NLRB No. 165, slip op., p. 10. See also *Big East*, 282 NLRB at 347, where the Board found insufficient control in the absence of evidence of "mid-season or on-the-spot discipline." But here the Board majority chose to abandon the need for actual discipline (of which there is none) in favor of a new "potential" control standard. Such results- oriented decision making by the Board cannot be enforced in this Circuit.

2. The Board Erred In Failing to Find That Officials Are Engaged In a Distinct Occupation or Business

Contrary to the Board (and even Chairman Miscimarra, who found this factor "inconclusive"), PIAA-registered officials are engaged in a distinct occupation from PIAA itself. PIAA is in the business of setting standards of fairness for amateur athletic competitions. Registered officials, on the other hand, are in the separate though related occupation of officiating individual competitions.

These are distinct occupations, as further evidenced by the fact that officials can and do practice their trade in leagues outside the coverage of PIAA.

The Court of Appeals for the Eleventh Circuit recently recognized this distinction in the analogous case of *Crew One Productions, Inc. v. NLRB*, 812 F.3d 945, 953-54 (11th Cir. 2016). The Board there found stagehands referred by Crew One to event producers to be performing "essential functions of the employer's operations" and relied on this factor in denying independent contractor status. The court reversed the Board and held:

> That the stagehands perform essential work "proves nothing in regard to the inquiry before us as it is also true in many relationships which are undisputedly that of a company to independent contractors." [citation omitted]. Crew One is in the business of referring stagehands to event producers, but Crew One does not perform stagehand work itself. Only the stagehands do. The undisputed facts about the work of the stagehands and the business of Crew One support a determination that the stagehands are independent contractors.

This Court made a similar finding in *Local 777, Seafarers v. NLRB*, 603 F.2d, 862, 898-99 (D.C. Cir. 1978), citing *Lorenz Schneider Co., Inc. v. NLRB*, 517 F.2d 445, 451 (2d Cir. 1975). Both the cab drivers in *Seafarers* and the insurance agents in *Lorenz* were found to perform "essential" work of the principals' businesses in those cases, but both courts found that did not alter the fact that the employees were performing a different occupation and were independent contractor agents of the principals.

Just so in the present case, the officials here are obviously affiliated with the PIAA, and they rely on the PIAA to set the standards for officiating and to certify through the registration process that the officials meet those standards. But only the officials actually officiate the games; the PIAA does not. The officials are thus engaged in activities that are distinct from the business of the PIAA, which administers the rules of the game but does not itself officiate individual contests. *Crew One*, 812 F.3d at 953; *Seafarers*, 603 F.2d at 898. The Board erred in finding the officials and PIAA to be engaged in the same occupation or business, or at best, this factor should have been found to be inconclusive in accordance with Chairman Miscimarra's dissent.

3. The Absence of PIAA Supervision Over the Officials Strongly Supports Their Independent Contractor Status

It is undisputed in this case that PIAA does not supervise officials during their games *at all*. Yet the Board majority sought to explain away the absence of such supervision by invoking the nature of officiating itself. (JA795-96). The Board's analysis of this factor stands the common law of agency on its head. It is precisely because of the nature of officiating that officials are not supervised by PIAA during games and are independent contractors, not employees. The Board so held in *Big East*, 282 NLRB at 343-44, and the Board has offered no principled justification in the present case for departing from that holding.

The Board compounded its error in analyzing the "supervision" common law factor by relying on PIAA's end of season evaluation of the officials' "body of work." (JA796). This Court has repeatedly held that the extent of actual supervision, not mere monitoring or after-the-fact evaluation, is the most critical factor. As the Court held in *C.C. Eastern, Inc. v. NLRB*, 60 F.3d at 858:

> [T]he extent of the actual *supervision* exercised by a putative employer over "the means and manner' of the workers' performance is the most important element to be considered." *Seafarers*, 603 F.2d at 873 (emphasis in original). It is important, however, to distinguish such company supervision from company efforts merely "to monitor, evaluate, and improve the results or ends of the worker's performance." *NAVL*, 869 F.2d at 599. Supervision of the "means and manner" of the worker's performance renders him an employee, while steps taken to "monitor, evaluate, and improve the results" of his work, without supervision over the means by and manner in which he does his work, indicates that the worker is an independent contractor.

See City Cab of Orlando, Inc. v. NLRB, 628 F.2d 261, 264 (D.C. Cir. 1980).

Other courts have similarly distinguished between after the fact evaluation and day-to-day supervision, particularly in analyzing the independent status of athletic officials. *See Yonan v. United States Soccer Fed'n, Inc*., 833 F. Supp. 2d 882, 889 (N.D. Ill. 2011) (rejecting referee's claim of employee status in the absence of in-game supervision, holding that post-match evaluation has no bearing on employee status: "It would be odd for someone not to take past performance into account when deciding whether to enter into a new contract."); *see also Meyer v. U.S. Tennis Assn*., 2014 U.S. Dist. LEXIS 128209 (S.D. N.Y. 2014) (finding

tennis officials to be independent contractors due in part to their exercise of independent judgment during matches).[13] These cases are also consistent with the Board's holding in *Big East*, as follows:

> In the absence of any evidence of mid-season or on-the-spot discipline, it appears that the ECBA's supervision does not amount to the type of control over the means and manner of the official's work that an employer would normally exercise. Rather such supervision appears to be addressed to the ends to be achieved by the officials.

282 NLRB at 347.

Moreover, the record of this case shows that the limited evaluation of officials engaged in by PIAA is mandated by the state government pursuant to Act 91. 24 P.S. § 16-1604-A. The Board therefore committed further error in its excessive reliance on PIAA's evaluation of officials, because the record is clear that PIAA's evaluation process is the product of government regulation. *FedEx I*, 563 F.3d at 501 (holding that evidence of control stemming from government regulation should be given no weight).

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13 The Board majority mistakenly dismissed any reliance on these and other cases decided under laws other than the NLRA. (JA795). Cases that find independent contractor status under the FLSA based on similar facts are particularly relevant because that Act has been interpreted as more broadly including anyone who is "suffered to work" in its employee definition. *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 148 (4th Cir. 2017). If a court has nevertheless rejected a claim of employee status for athletic officials under the broader definition of the FLSA, then it should be even less likely for a similar individual to be found to be an employee under the narrower definition of the NLRA.

For each of these reasons, the Board erred in failing to find the clear absence of game day supervision to be strongly supportive of independent contractor status.

4. The Skills Required to Be an Official Support a Finding That They Are Independent Contractors

The Board acknowledged that officials must have particularized skills in order to officiate a lacrosse game. (JA796). According to the common law of agency, this should have required the Board to find this factor supported the finding that the officials are independent contractors. But the Board failed to so find, again departing from precedent without justification. *See Big East Conference*, 282 NLRB at 335.

First, the Board changed the subject by mixing the question of skills with the "integral to the principal's business" factor, already discussed. (JA796). This form of "double counting" of the common law factors is not acceptable. *See Porter Drywall*, 362 NLRB No. 6, slip op., p.4 (skilled drywall crew leaders found to be independent contractors); *Pennsylvania Academy of Fine Arts*, 343 NLRB 846, 847 (models demonstrating "high level of skill" found to be independent contractors).

The Board majority also declared that skill levels do not preclude finding officials to be employees, but that truism does not justify the Board's failure to concede any support for an independent contractor finding in the skills factor itself. The cases relied on by the Board for its minimizing of the skills factor here are

each distinguishable. Thus in *Lancaster Symphony*, relied on by the Board majority, this Court actually held that the skill of the orchestra musicians suggested independent contractor status, but this factor was outweighed by the separate factor of control, as discussed above, due to the unique degree of control exercised by the orchestra conductor, and other factors. 822 F.3d at 568. As previously noted, there is no conductor or analogous "dictator" over game day officials present here.

Another case cited by the Board in its discussion of the skills factor, *CNN America*, 361 NLRB No. 47 (2014), contained no discussion of employee skills in the context of independent contractor status; rather any discussion of skills was confined to a "joint employer" analysis. This Court also subsequently declined to enforce that aspect of the Board's holding. *NLRB v. CNN Am., Inc.*, 865 F.3d 740 (D.C. Cir. 2017).

The Board's analysis of the skill level factor in the present case, if enforced by this Court, would read out of the Restatement one of the significant common law factors, which has repeatedly been held to support a finding of independent contractor status in the cases cited above and other similar rulings. The Board's analysis is not entitled to deference or enforcement by this Court.

5. The Board Erred in Failing to Give Weight to the Officials' Supplying Their Own Instrumentalities of Work

The Board acknowledged that the officials in this case provide their own equipment, including whistles, pencils, uniforms, hats, penalty markers, timing

devices, and scorecards. (JA797). But the Board did so only after claiming that PIAA "provides the place and time of work," indirectly during the regular season and directly during the playoffs, by designating the sites and times of the games. (*Id.*). The Board erred factually and as a matter of law in its treatment of this factor.

First, during the regular season (which provides more than 70% of the officials' work availabilities), PIAA plays *no* role in designating sites or times of games. All such designations are handled by the competing schools. In addition, the officials are under no obligation to appear at such designated sites or times because they have complete discretion whether to accept any assignment from the schools.

Even during the brief playoff period consisting of relatively few games assigned to relatively few officials, the officials are under no obligation to accept playoff assignments or to officiate any particular game at any particular time or place. Even during the playoffs the designated field does not belong to, and is not "supplied" by, PIAA. The field is typically a public venue belonging to and supplied by one of the schools. In any event, such a designation is inherent in any athletic competition, and thus it should carry no weight in favor of employee status.

Therefore, the Board erred in failing to find that the officials' ownership of the instrumentalities of their occupation strongly supports a finding of independent contractor status. *See, e.g., FedEx Home Delivery v. NLRB (FedEx I)*, 563 F.3d at 503.

6. The Short Length of the Lacrosse Season Strongly Supports Independent Contractor Status

Equally disingenuous was the Board majority's finding that the brevity of the lacrosse season was an "inconclusive factor" in the independent contractor analysis. (JA797). The Board observed that PIAA registers officials annually (*Id.*), but the act of registration says nothing about the length of time in which the officials perform their jobs. The Board acknowledged that the single game assignments are "short term," but then hedged its analysis by opining that the games evidenced more the relationship between the officials and the schools, rather than their relationship with PIAA. (*Id.*). Yet the Board elsewhere repeatedly found that PIAA was "indirectly" responsible for the schools' relationship with the officials, where such responsibility supported employee findings. *See also Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847 (models' single semester contracts held to support independent contractor finding).

Also wrong is the Board's reliance on the fact that some unspecified number of officials return to officiate games in more than one year. Unlike the facts in *Lancaster Symphony Orchestra*, 357 NLRB at 1766, where the musicians were

automatically eligible to return to the orchestra once they played in a season, PIAA-registered officials must satisfy numerous requirements before receiving assignments from member schools from year to year. For this reason as well, the Board erred in failing to give weight to the short duration factor and in failing to find independent contractor status.

7. The Method of Paying the Officials Strongly Supports a Finding of Independent Contractor Status

It is undisputed in the record that the officials are paid on a per-game basis, regardless of how long each game lasts, and that PIAA does not withhold deductions from officials' pay. The Board has repeatedly held that such payment methods are strong indicators of independent contractor status. *Big East Conference*, 282 NLRB at 335; *Pennsylvania Academy of the Fine Arts*, 343 NLRB at 847; *Crew One productions, Inc.*, 811 F.3d at 1312; *Argix Direct, Inc.*, 343 NLRB at 1021.

For most of the seasondiPIAA does not pay the officials at all because they are paid by the schools. (JA431; JA29). The Board's claim that PIAA "directly controls the process" by which schools pay officials is contrary to the record, which shows that both schools and officials can and do negotiate their own fees, and that different schools pay different fees for officials throughout the state. (*Id.*). The Board thus erred again in discounting the "method of payment"

factor and should have found this factor strongly supported independent contractor status.

8. Contrary to the Board, PIAA Is Not In the Business of Officiating, But Is Only In the Business of Registering and Certifying Officials to Maintain Uniform Athletic Standards

As previously discussed, the Board majority conflated the roles of PIAA and the officials in order to find that the work of the officials is "integral" to the "business" of PIAA. In the same manner, the Board improperly found that the officials' work is "part of" PIAA's regular business and that PIAA is in the same business as the officials. (JA798). Contrary to the Board, this factor should have been deemed to be inconclusive at best and certainly should not have been found to "strongly support" a finding of employee status.

It is simply not true that PIAA "could not perform its business operations without the work of its officials." (*Id.*). Certainly, registering and certifying the officials facilitates PIAA's mission of creating a system of fair play for interscholastic sports; but such certification is not the *only* way in which uniform standards could be maintained. Among many other possibilities, the Pennsylvania General Assembly could have chosen to regulate the officials separately from PIAA. But there was no legal requirement for PIAA or the officials to operate in such a cumbersome fashion, nor do PIAA's activities constitute employment of the officials who are registered with PIAA.

It must also be recalled that PIAA has treated the officials as independent contractors for many decades, and has been repeatedly found by other government agencies and courts in Pennsylvania to be justified in operating in such fashion. Absent reversal, the Board's order will be deeply destabilizing to interscholastic athletics in Pennsylvania and elsewhere, and for this reason as well should be denied enforcement.

9. The Board Erred In Finding "Inconclusive" the Obvious Belief of the Parties That They Created an Independent Contracting Relationship

The Board acknowledged that "numerous" PIAA documents describe the officials as independent contractors. (JA799). Instead of finding this factor to strongly support independent contractor status, however, the Board declared that all of the documents in the record were "unilaterally created and imposed by PIAA, which diminishes the weight to be given to them." (*Id*.). The Board again wrongly relied on its vacated decision in *FedEx* in this regard. (*Id*.).

Contrary to the Board, this Court has held that independent contractor agreements entered into by the parties are "indicative" of independent contractor status. *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858-59 (D.C. Cir. 1995). The Eleventh Circuit in *Crew One* cited and relied on *C.C. Eastern* and further explained the Board's error in similarly dismissing the parties' signed independent contractor agreements as follows:

> One of the Restatement factors is the intent of the parties, [citation omitted], and an agreement that designates the worker as an independent contractor is evidence of intent to create such a relationship. * * * If the Board had found fraud, duress, or some other defense to formation, it would have been correct to disregard the agreements. But the Board made no such finding. It gave the agreements less weight only because Crew One insisted that all of the stagehands sign one. This theory is not a valid defense to the formation of the agreements. Contrary to the argument of the Board, the significance of the agreements is not "undercut" by the fact that all of the stagehands signed one.

812 F.3d at 952-53.

In the present case, each of the officials voluntarily entered into contracts containing the description of their positions as independent contractors. The evidence in the record shows that the officials (including among them an attorney and even an NLRB employee) fully understood what they signed. The officials were also aware that every state government agency or court to consider the status of PIAA officials had found them to be independent contractors.[14] Hence, it cannot be denied that the parties intended to enter into an independent contract relationship, and that this factor of common law agency strongly supports an independent contractor finding. The Board's finding to the contrary is not entitled to enforcement.

14 *PIAA*, Pennsylvania Labor Relations Board (PLRB) Case No. PERA-R-13, 417-C (1980); *see also Lynch v. WCAB*, 554 A.2d 159 (Pa. Cmwlth. 1989); *Ray v. PIAA*, EUC-12-09-B-3131(Referee's Decision/Order May 24, 2012).

10. Contrary to the Board Decision, There Is No Common Law Requirement That Independent Contractors Operate an Independent Business Enterprise

Relying again on the vacated *FedEx* standard, the Board majority found it significant that the officials do not operate independent businesses. (JA799). This supposed factor does not appear in the Restatement but was created out of whole cloth by the Board in the *FedEx* case, which was vacated by this Court. Therefore, PIAA should not be obligated to meet such a test.

Nevertheless, the record is undisputed that the officials maintain other full-time careers, are free to officiate at non-PIAA games and officiate other games anywhere and anytime they want. They have total freedom to make the entrepreneurial decision to increase or decrease their earnings by simply accepting more or fewer assignments at their discretion or by devoting more or less time to their independent careers. Identical facts in the *Big East* case led the Board to find that the officials there "seem to operate their own independent businesses." 282 NLRB at 343. To the extent the Board contends that officials cannot be independent contractors unless they are allowed to hire their own substitutes, that position was properly rejected by the Third Circuit more than 30 years ago. *See College Basketball Officials Assn., Inc. v. NLRB*, 836 F.2d at 147. No reason exists to depart from the holding of that case now.

11. Summarizing the Tally of Independent Contractor Factors and the Applicable Precedents

For the reasons explained above, the overwhelming majority of the common law factors should have been found by the Board to support independent contractor status. This is particularly so with regard to the small degree of PIAA control over the officials' management of games, the complete absence of PIAA supervision at the games, the high level of skills required of the officials, the officials' supply of their own work tools, the brief length of the season, the method of payment, and the parties' mutual understandings. The Board clearly erred in failing to find independent contractor status based on these factors.

Also contrary to the Board's opinion, the material facts of the *Big East Conference* case were strikingly similar to the present case, and the Board should have followed its own precedent established in *Big East* with regard to PIAA. In *Big East*, the Board relied on its findings that the officials there were highly skilled, had the ability to accept or refuse assignments, had never been terminated or disciplined for in-season performance, paid dues to the association, were paid on a fixed fee basis, had other full-time employment, and could increase their earnings by officiating for other entities. 282 NLRB at 335. All of these same facts are present with regard to PIAA-registered officials.

The Board's attempt to distinguish *Big East* rings hollow. First, the Board claimed that the decision is somehow "dated." (JA800). Yet the case was cited

favorably by the Board itself as recently as 2015 in the *Porter Drywall* decision, and the validity of the *Big East* decision was never called into question until now. Equally disingenuous is the Board's claim that *Big East* is somehow distinguishable because of the role played by the officials' CBOA association in that case. A plain reading of the Board's decision, and the Third Circuit's enforcement of it, shows that the Board at the time gave little or no weight to the official association's screening function, negotiation of a fee schedule, or evaluation of officials' performance. Indeed, the Board specifically stated that it was "unnecessary to rely on the judge's finding that the officials' capacity to affect their working conditions by negotiating through an agent, the CBOA, supports the inference that they are independent contractors." 282 NLRB at 335, n.1. For the same reasons, the Board should have applied *Big East* to the virtually identical facts in the present case and should have found the officials here to be independent contractors.

D. The Board's Order Should Also Be Denied Enforcement Because PIAA Is a Political Subdivision Within the Meaning of the Act

The Board erred in relying on the Regional Director's Decision and Direction of Election, which found that PIAA is a private entity that falls within the jurisdiction of the Board. To the contrary, PIAA is a political subdivision of the Commonwealth of Pennsylvania exempted from the NLRA under Section 2(2) of that Act. The Regional Director's decision, which the Board improperly chose not

to review, misstated and omitted material facts that establish PIAA as a political subdivision. The Regional Director also failed to apply correctly the Board's legal standard on this issue, as interpreted by the Supreme Court.

As noted above, the Board's test for political subdivision status is set forth in the Supreme Court's decision in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) ("*Hawkins County*"). Under *Hawkins County*, a political subdivision is an entity that is either 1) created by the state, such that it constitutes a department or administrative arm of state government, or 2) administered by individuals who are responsible to public officials or to the general electorate. *Hawkins County*, 402 U.S. at 604-605. It should also be noted that the Court reversed the Board's application of its own test in *Hawkins County*, holding contrary to the Board that the utility district at issue was a political subdivision.[15]

In the present case, the Regional Director first found that PIAA was not a political subdivision because it was not "created" by the State, rejecting PIAA's argument that it had been effectively "re-created" as an arm of the Commonwealth

15 Of particular relevance to the present case, the Board's error that resulted in reversal by the Supreme Court in Hawkins County was the agency's mis-application of the second criterion. The Board disqualified the employer from political subdivision status because the entity was not administered by "state-appointed or elected officials." Reversing the Board, the Supreme Court held: "[T]he Board test is not whether the entity is administered by "State-appointed or elected officials." Rather, alternative (2) of the test is whether the entity is "administered *by individuals who are responsible to public officials* or to the general electorate" (emphasis in original). 402 U.S. at 605.

upon passage of Act 91 in 2002. (JA671). Second, the Regional Director found that PIAA is not "administered by individuals who are responsible to public officials or the electorate," based solely on the erroneous finding that a majority of the individuals who administer the entity are not appointed by or removed by public officials. (JA672). The Regional Director erred in both aspects of her ruling on this issue, and the Board's adoption of the Regional Director's decision must therefore be reversed.

First, contrary to the Regional Director's conclusion, the Pennsylvania legislature plainly created the current version of the PIAA with the passage of Act 91. The Pennsylvania General Assembly amended the Pennsylvania Public School Code specifically to "deal with interscholastic athletics accountability." Act 91, 24 P.S. § 1601-A. With the passage of Act 91, the General Assembly became responsible for overseeing PIAA, establishing the Pennsylvania Athletic Oversight Council to ensure that PIAA complied with standards created and imposed by the General Assembly. 24 P.S. § 16-1603-A. The General Assembly then created the Oversight Committee, consisting of three state senators and three state representatives, for the express purpose of overseeing the operations of the PIAA, a function which continues today. 24 P.S. § 16-1605(A).

As discussed above, Act 91 also required PIAA to comply with the Pennsylvania Sunshine Act like other public agencies; required PIAA to establish

an open bidding policy for game site selection and for the purchase of merchandise; required PIAA to establish a statewide evaluation system for sports officials at the post-regular season level; required PIAA to establish policies prohibiting conflicts of interest and rules of ethics; and required PIAA to undergo annual financial and management reviews by the General Assembly. Many of these requirements are only applicable to public agencies. Under Act 91, if PIAA did not comply with the standards set forth in the Public School Code, it could be dissolved by the General Assembly and "a new entity to oversee the operation of interscholastic athletics in this Commonwealth" would be proposed. 24 P.S. §16-1604-A.

Based upon the foregoing statutory provisions, contrary to the Regional Director's findings, PIAA satisfies the first prong of the *Hawkins County* test. Though this appears to be a question of first impression in this Circuit (and elsewhere), PIAA in its present form was plainly created (or "re-created") by Act 91, such that it now constitutes a department or administrative arm of state government, overseeing interscholastic athletics throughout the state as a public service of the Commonwealth. *Hawkins County*, 402 U.S. at 605.

The primary case relied on by the Regional Director, *Chicago Mathematics & Science Academy Charter School, Inc. (CMSA)*, 359 NLRB 455 (2014), is distinguishable. There, CMSA operated a private charter school which entered into

an agreement with the Chicago School Board to perform some charter school functions. A Charter School law was later enacted to regulate such charter school activities. *Id*. at 461. Nothing in the state law altered the private character of the CMSA or charter schools generally in Illinois, and the Board appeared to view CMSA as a "government contractor." *Id*.

In the present case PIAA was created in 1913 by *public* schools to serve the public purpose of standardizing and overseeing fairness in interscholastic athletics among such schools. PIAA was re-established and its Board reconstituted by Act 91 in 2002 to make clear that it was serving a public function with oversight by the General Assembly through the Oversight Council and then the Oversight Committee. PIAA has never claimed to be a government contractor, is instead acting as an arm of the Commonwealth and has been recognized as such in numerous state laws.

Likewise distinguishable is this Court's decision in *Midwest Div.-MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017). In that case, a private hospital argued that its Nursing Peer Review Committee qualified as a political subdivision. This Court concluded that the Nursing Peer Review Committee was not a "political subdivision" with respect to *Hawkins County's* first prong, because the State of Kansas required all hospitals to have a peer review committee, and this was not

enough to find that it was created directly by the state, so as to constitute an arm of government. *Id*. at 1296.

Act 91 was aimed directly at re-establishing PIAA as the overseer of interscholastic athletic competition throughout the Commonwealth of Pennsylvania. By this Act, the General Assembly did much more than simply regulate a type of committee present in all private athletic leagues. Nothing in *Hawkins County* indicates that the requirement of "creation" of a political entity should foreclose the possibility of an entity's "re-creation." *Hawkins County* at 603-4.

Even if the Board's application of the first criterion of *Hawkins County* could be allowed to stand, however, the Board's ruling must still be reversed for mis-applying the second criterion dealing with whether PIAA is administered by individuals who are "responsible to public officials or to the general electorate." 402 U.S. at 605.

As to this second criterion, the Regional Director erred by asserting "there is no evidence or suggestion in the record that the groups from which the remaining Board members are selected are themselves public entities or that they were created and formed at the behest of the government." (JA673).

To the contrary, PIAA Executive Director Lombardi testified without contradiction that "almost all" of the PIAA Board members were representatives of

public schools, and were selected by the schools through their various associations. (JA26-7; *see also* JA415-16, List of the Members of the PIAA Board and their affiliations). In addition, PIAA's Constitution which is part of the record, clearly establishes that the Board is dominated by public school representatives and incorporates the statutory requirements of Act 91. (JA415).

In addition, as discussed above, Pennsylvania's General Assembly specifically created the Pennsylvania Athletic Oversight Council and then the Pennsylvania Athletic Oversight Committee, in order to make sure that PIAA officials would be responsible to the legislature through these committees. And the facts show that PIAA has been responsible to the public officials on the committees by reporting regularly to them and adhering strictly to the 13 new governmental standards spelled out in Act 91.

Under such circumstances, PIAA should be found to satisfy the second criterion of *Hawkins County*. The Fourth Circuit's decision in *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174 (4th Cir. 1991) is instructive. There, the court concluded that the entity in question was administered by individuals who were responsible to elected officials, notwithstanding that the entity's administrators were not directly appointed by the state or local governments. *Id*. at 179. A similar outcome occurred in *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266 (6th Cir. 1990) (cited in *Princeton Memorial*). The Court noted that "the

unusual arrangement by which the Board members of Princeton Memorial Hospital are chosen does not change the fact that the responsibility to public officials is ultimately there." *Id*. *See also Northern Community Mental Health Center, Inc*., 241 NLRB 323 (1979) (community health center found to be a political subdivision where 12 of 14 members of the governing board were appointed by local county boards of supervisors).

This Court's decision in *Midwest Div. – MMC, LLC* is again distinguishable. There, the Court concluded that the Committee did not meet the second prong of the *Hawkins* test because the hospital was not administered by individuals who were responsible to public officials or to the general electorate. *Id*. at 1297. Unlike the hospital in *Midwest Div.-MMC, LLC*, however, the majority of PIAA's Board are elected or appointed by and subject to removal by public officials, i.e., the public schools who make up 85% of PIAA's 1400 member schools, the school boards who make their selections through the public school board association, their athletic directors, and the public school principals. Under such circumstances, PIAA must be found to be a political subdivision under *Hawkins County*.

VIII. CONCLUSION

For the reasons set forth above, PIAA asks that its petition for review be granted and that the Board's cross-petition for enforcement be denied.

October 3, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to FRAP 27(d)(2) the Petitioner certifies that this motion contains 12,554 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/Maurice Baskin
Maurice Baskin

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Final Opening Brief was electronically transmitted to the Court this 3rd day of October, 2018, using the Court's ECF filing system, and was served on all counsel via electronic notice pursuant thereto.

/s/Maurice Baskin
Maurice Baskin

STATUTORY ADDENDUM

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Section 2 of the NLRA, 29 U.S.C. § 152:

(2)The term "employer" . . . shall not include . . . any State or political subdivision thereof, ...

(3) The term "employee" shall include any employee, . . . but shall not include . . .any individual having the status of an independent contractor, ...

Section 10 of the NLRA, 29 U.S.C. § 160:

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, ... No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

24 P.S. § 16-1601-A, *et seq*. (Act 91)

§ 16-1601-A. Scope

This article deals with interscholastic athletics accountability.

§ 16-1602-A. Definitions

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Association." The Pennsylvania Interscholastic Athletic Association. "Committee." The Legislative Budget and Finance Committee.

"Council." The Pennsylvania Athletic Oversight Council as established in section 1603-A.

"Interscholastic athletics." All athletic contests or competitions conducted between or among school entities situated in counties of the second class, second class A, third class, fourth class, fifth class, sixth class, seventh class and eighth class.

"Nonpublic school." A school, other than a public school within this Commonwealth, wherein a resident of this Commonwealth may legally fulfill the compulsory school attendance requirements of this act and Title VI of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241).

"School entity." A public school, school district, nonpublic school or private school in this Commonwealth other than a private or nonpublic school which elects not to become a member of the association.

§ 16-1603-A. Pennsylvania Athletic Oversight Council

(a) The Pennsylvania Athletic Oversight Council is established.

(b) The council shall have seventeen voting members, appointed as follows:

(1) Two members of the Senate, of which one shall be appointed by the President pro tempore of the Senate and one shall be appointed by the Minority Leader of the Senate. To the greatest extent possible, appointees should have

some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(2) Two members of the House of Representatives, of which one shall be appointed by the Speaker of the House of Representatives and one shall be appointed by the Minority Leader of the House of Representatives. To the greatest extent possible, appointees should have some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(3) The Secretary of Education or a designee.

(4) Twelve members shall be appointed as follows:

(i) The following organizations shall each submit three nominations to the Governor, who shall then select two of the names submitted from each of the organizations to serve on the council. To the greatest extent possible, these appointments shall be representative of all of the Pennsylvania Interscholastic Athletic Association's athletic districts:

(A) The Pennsylvania Association of Secondary School Principals.

(B) The Pennsylvania Association of School Administrators.

(C) The Pennsylvania School Boards Association.

(D) The Pennsylvania State Athletic Directors Association.

(ii) The following organizations shall each submit two nominations to the Governor, who shall then select one of the names submitted from each of the organizations to serve on the council. To the greatest extent possible, these appointments shall be representative of all of the Pennsylvania Interscholastic Athletic Association's athletic districts:

(A) The Pennsylvania Congress of Parents and Teachers.

(B) The Pennsylvania Coaches Association. (C) The Officials Council.

(iii) One member, as selected by the Governor, representing those nonpublic schools that are members of the association. (5) At least one member appointed under paragraph (4) must be associated with women's athletics,

including a coach of a women's athletics team or the parent of a participant in women's athletics. (c) Terms are as follows:

(1) Members appointed by the Governor shall serve for the duration of the existence of the council.

(2) Legislative members appointed by the Senate and the House of Representatives shall serve at the pleasure of the appointing authority.

(d) Vacancies occurring on the council by death, resignation, removal or any other reason shall be filled within thirty (30) days of the creation of the vacancy in the manner in which that position was originally filled. An individual appointed to fill a vacancy shall be appointed for the unexpired term of the member he succeeds.

(e) The members of the council shall receive no actual compensation for their services. However, all expenses reasonably necessary for the members of the council to perform their duties shall be paid by the Department of Education.

(f) The duties and responsibilities of the council shall be as follows:

(1) To meet no less than four times a year at the call of the chair. All such meetings shall be conducted in accordance with the requirements of 65 Pa.C.S. Ch. 7 (relating to open meetings).

(2) To make recommendations concerning changes to the administration of interscholastic athletics to the association. The council shall make recommendations on issues, including, but not limited to:

(i) Appeals.

(ii) Athletic eligibility.

(iii) Transfers of students.

(iv) Expansion of PIAA-sanctioned athletic competitions or sports, including the addition of other athletic associations into PIAA-sponsored championships.

(3) To review and monitor the efforts of the association to meet the criteria listed in section 1604-A(a) and (b).

(4) To hold public hearings, subject to the requirements of 65 Pa.C.S. Ch. 7, on any issue concerning interscholastic athletics. These issues shall include, but not be limited to:

(i) Appeals.

(ii) Athletic eligibility.

(iii) Transfers of students.

(iv) Expansion of PIAA-sanctioned athletic competitions or sports, including the addition of other athletic associations into PIAA-sponsored championships.

(5) To have access to all books, papers, documents and records of the association in order to complete the annual report required under clause (6).

(6) To issue an annual report to the chairman and minority chairman of the Education Committee of the Senate, the chairman and minority chairman of the Education Committee of the House of Representatives and the president of the association summarizing:

(i) The council's meetings, public hearings and other action taken by the council.

(ii) The recommendations of the council made during the year and the association's response to each recommendation.

(iii) The efforts of the association to meet the criteria listed in section 1604-A(a) and (b).

(7) To issue a final report three (3) years after the Governor has made the final appointments to the council to the chairman and minority chairman of the Education Committee of the Senate and the chairman and minority chairman of the Education Committee of the House of Representatives and the president of the association summarizing all of the council's actions and recommendations over the previous three (3) years, the association's response to each and the final determination of the council under subsection (g).

(8) To elect a chairman and a vice chairman. (9) To, at the council's discretion, request the committee to perform an audit on any phase of the association's

compliance with the criteria listed in section 1604-A(a) or (b), as necessary for the purposes of completing its annual or final report.

(g) Expiration of council is as follows:

(1) If, by a majority vote, the council finds that the association has met the criteria listed in section 1604-A (a) and (b) to its satisfaction, the association shall continue to oversee the operation of interscholastic athletics in this Commonwealth, and the council shall expire. The council shall publish a notice of its expiration in the Pennsylvania Bulletin.

(2) If, by a majority vote, the council finds that the association has failed to meet the criteria listed in section 1604-A(a) and (b) to its satisfaction, the council shall, within one (1) year of its finding, submit a proposal for the selection of a new entity to oversee the operation of interscholastic athletics in this Commonwealth to the chairman and minority chairman of the Education Committee of the Senate and the chairman and the minority chairman of the Education Committee of the House of Representatives. Upon submission of the proposal, the council shall expire, and the council shall publish a notice of its expiration in the Pennsylvania Bulletin. The association shall be allowed to continue to oversee the operation of interscholastic athletics in this Commonwealth only until such time as a new entity is authorized to do so.

(h) Staff.--The Pennsylvania Department of Education shall provide support staff as needed to the council.

§ 16-1604-A. Council recommendations and standards

(a) The association shall take all steps necessary to comply with the recommendations of the council, including recommendations concerning appeals, athletic eligibility and transfers of students.

(b) The association shall take all steps necessary to comply with the following standards:

(1) Adopt and adhere to policies governing the conduct of open meetings that conform with the requirements of 65 Pa.C.S. Ch. 7 (relating to open meetings).

(2) Adopt and adhere to a policy establishing a competitive bidding process for the purchase of nonincidental merchandise and services that conforms with the requirements of this act.

(3) Adopt and adhere to a policy establishing a competitive process for the selection of sites for championship competitions.

(4) Agree to an annual financial and management review conducted by the committee.

(i) Such reviews shall indicate whether the association has:

(A) conformed with accepted accounting practices;

(B) conformed with all Federal and State statutes governing the administration of nonprofit organizations;

(C) conformed with accepted administrative and management practices; and

(D) contracted with employees who have fulfilled the duties for which they were contracted and act in the best interests of interscholastic athletics.

(ii) The committee shall report its findings from this review to the council, which shall make any appropriate recommendations to the association.

(5) Ensure that the membership of its board of directors includes the following who shall be full, voting members:

(i) One member representing school boards of directors who is an elected member of a school board of directors at the time of appointment.

(ii) One member representing athletic directors who is employed as an athletic director at the time of appointment.

(iii) One member representing coaches who is employed as a coach at the time of appointment.

(iv) One member representing officials who is an active official at the time of appointment. (v) One member representing the Department of Education.

(vi) One member representing school administrators who is employed as a school administrator at the time of appointment.

(vii) One member representing women's athletics.

(viii) One member representing nonpublic schools. (ix) Two members representing parents.

(6) Not require any member school entity to reimburse the association for legal fees and expenses incurred by the association or any of its personnel in defending a legal action authorized by a member school entity and brought against the association or any of its personnel and take action to repeal any present rule or policy authorizing such reimbursement prior to the final report of the council.

(7) Adopt an evaluation system for game officials at district, interdistrict and championship competitions and utilize that evaluation system in the selection of individuals to officiate those contests.

(8) Adopt and adhere to a policy prohibiting conflicts of interest and setting forth rules of ethics to be followed by association board members and employes.

(9) Employ in-house counsel.

(10) Evaluate the performance of its contracted employes to determine whether they have complied with the provisions of their contracts and to determine whether termination is appropriate for any association employes who have violated the provisions of their contracts.

(11) Adopt no rules restricting media access to interscholastic athletic competitions or restricting the substance of any commentary offered by media reporting of interscholastic athletic competitions.

(12) Adopt rules intended to discourage its member school entities from recruiting student athletes, provided that:

(i) Such rules and any penalties levied for their breach shall be directed at the association's member schools and not at individual student athletes who may have been the subject of recruiting.

(ii) Any and all procedures established to gather evidence related to the enforcement of such rules shall place the burden of proof of the breach of such rules on the association and shall afford any member school entity due process rights in defending itself against the allegations, including a right to a hearing on the charges before the imposition of penalties.

(iii) The association is specifically prohibited from identifying individual student athletes as subjects or targets of such procedures.

(13) Establish a policy, including a mechanism for enforcement, requiring that persons involved in interscholastic athletics be provided equality of opportunity and treatment without regard to race, sex, religion, national origin or ethnic background.

(14) By August 8, 2011, establish a policy requiring that students who in the current or prior school year attended a school entity that has abolished its program of interscholastic athletics in whole or in part shall be eligible to participate without penalty in the program of interscholastic athletics of another school entity in which they are currently enrolled, provided that:

(i) If the association fails to establish and enforce the policy, no school entity may be a member of the association and may not pay dues to the association directly or indirectly through an affiliated organization.

(ii) No school entity that is a member of the association may recruit to participate in its program of interscholastic athletics any students who attend a school entity that has abolished its program of interscholastic athletics.

(iii) If a school entity that has abolished its program of interscholastic athletics in whole or in part reinstates its program of interscholastic athletics

in whole or in part in a subsequent year, a student who is currently or was previously enrolled in the school entity but who has participated in the program of interscholastic athletics of another school entity under this section shall be eligible to participate without penalty in the program of interscholastic athletics of the school entity that reinstated its previously abolished program in whole or in part.

§ 16-1605-A. Pennsylvania Athletic Oversight Committee

(a) The Pennsylvania Athletic Oversight Committee is hereby established.

(b) The committee shall have six voting members who shall serve at the pleasure of the appointing authority and be appointed as follows:

(1) Three members of the Senate, of whom two shall be appointed by the President pro tempore of the Senate and one shall be appointed by the Minority Leader of the Senate. To the greatest extent possible, appointees should have some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(2) Three members of the House of Representatives, of whom two shall be appointed by the Speaker of the House of Representatives and one shall be appointed by the Minority Leader of the House of Representatives. To the greatest extent possible, appointees should have some experience in interscholastic athletics or shall be parents of students involved in interscholastic athletics.

(3) A chairman and vice chairman shall be elected from among the members appointed under this subsection.

(c) The committee shall meet at least once each year for the purpose of reviewing the association's continued compliance with the criteria listed in section 1604-A (a) and (b) and responding to issues related to the activities of the association referred to the committee. The committee shall issue an annual report of its findings to the President pro tempore of the Senate and the Speaker of the House of Representatives.

Pennsylvania Right to Know Law, 65 P.S. Public Officers § 67.102.102 Definitions

"State-affiliated entity." A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Higher Educational Facilities Authority. The term does not include a State-related institution.